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SERVICE DATE – SEPTEMBER 4, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42121

TOTAL PETROCHEMICALS & REFINING USA, INC.

v.

CSX TRANSPORTATION, INC.

Digest:¹ In response to a request for reconsideration, the Board reconsiders an order issued on July 24, 2015, to the extent that Total Petrochemicals & Refining USA, Inc. (TPI) may elect whether it will file supplemental evidence regarding additional trains, while explaining that the reasoning of that order was supported by the record and precedent. The Board denies reconsideration of its order that CSX Transportation, Inc. (CSXT), file supplemental Rail Traffic Controller (RTC) model evidence. The Board also clarifies the scope of the supplemental evidence that the parties may file and denies CSXT's motion to amend the procedural schedule.

Decided: September 3, 2015

Total Petrochemicals & Refining USA, Inc. (TPI) has sought reconsideration and clarification of a decision issued on July 24, 2015 (Supplemental Evidence Order), in which the Board ordered TPI and CSX Transportation, Inc. (CSXT), to each submit sufficient supplemental evidence to allow the Board to consider the parties' operating plans. We will reconsider that order to allow TPI to choose whether it will file revised evidence regarding additional trains, but we will explain that the reasoning underlying the order was valid. We will not reconsider the Board's order that CSXT file supplemental Rail Traffic Controller (RTC) model evidence and will deny CSXT's motion to amend the procedural schedule. If, in light of this decision, the parties agree to a revised procedural schedule, they may propose it.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

Pending before the Board is a complaint in which TPI challenges the reasonableness of rates established by CSXT for transportation between 104 origin and destination pairs, located primarily in the Midwestern and Southeastern United States. The Board bifurcated this proceeding and decided the market dominance issue before entering the case's rate reasonableness phase. The parties made, and the Board granted, multiple motions to extend the original rate reasonableness procedural schedule.

On November 5, 2014, TPI submitted its rate reasonableness rebuttal evidence, which was accompanied by a petition to supplement the record. CSXT responded to TPI's petition to supplement on November 25, 2014. In a decision served on December 10, 2014, the deadline for final briefs was held in abeyance in order for the Board to consider the arguments presented in TPI's petition to supplement and CSXT's reply. Subsequently, on its own initiative, the Board held a technical conference with the parties regarding their operating plans and RTC model evidence on May 27, 2015. On July 24, 2015, the Board issued the Supplemental Evidence Order, in which the Board addressed TPI's petition to supplement the record, ordered TPI and CSXT each to submit sufficient supplemental evidence to allow the Board to consider the parties' operating plans, and established a procedural schedule to complete the submission of evidence in the rate reasonableness phase of this proceeding. On the same day, the Board also issued a decision ordering the parties to submit compliance evidence (Compliance Evidence Order). Under the current procedural schedule, the parties' supplemental and compliance evidence filings are due on September 22, 2015.

TPI filed a petition for reconsideration of the Supplemental Evidence Order on July 31, 2015. CSXT filed a reply² to TPI's petition for reconsideration on August 12, 2015. TPI filed a motion for leave to reply to that filing and a reply to CSXT's reply on August 14, 2015. CSXT replied to TPI's motion for leave to file a reply on August 21, 2015. In addition, CSXT filed a motion to amend the procedural schedule on August 12, 2015, and TPI replied to that motion on August 14, 2015.

² We will refer to this filing as CSXT Reply to Petition. We will refer to CSXT's July 21, 2014 reply rate reasonableness evidence as CSXT Reply.

DISCUSSION AND CONCLUSIONS

Motion for Leave to File a Reply to a Reply

TPI acknowledges that the Board's rule, 49 C.F.R. § 1104.13(c), does not permit replies to replies. However, TPI argues that its filing is necessary to address misrepresentations by CSXT. CSXT responds that TPI's filing does not correct any misrepresentations and merely is an attempt to get the last word regarding certain issues.

We will deny TPI's motion for leave to file a reply to a reply. Given the upcoming deadline for supplemental evidence, TPI has requested expedited consideration of its petition for reconsideration. Acceptance of additional filings would slow the Board's consideration of the petition. The Board has denied leave to file a reply under § 1104.13(c) under similar circumstances, and we will do so here. See Total Petrochemicals & Refining USA v. CSX Transp., Inc., NOR 42121, slip op. at 17 n.55 (STB served Dec. 19, 2013); Beaufort R.R.—Modified Rail Certificate, FD 34943, slip op. at 5 (STB served July 20, 2005); Minn. Power, Inc. v. Duluth, Missabe & Iron Range R.R., 4 S.T.B. 64, 66 (1999).

Moreover, TPI's arguments show that the parties disagree regarding interpretation of the evidence in this proceeding. TPI may raise these arguments in its supplemental evidence filing, its reply to the initial supplemental evidence filing, or its final brief. To the extent that TPI argues that CSXT misstated TPI's burden of submitting revised evidence, additional argument is not required for the Board to address the issue here. Also, we will not accept CSXT's reply to TPI's August 14 filing, as it is moot.

Petition for Reconsideration

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3. TPI argues that the Board materially erred in the Supplemental Evidence Order. As explained below, we will reconsider the Supplemental Evidence Order to the extent that TPI may choose whether it will file supplemental evidence regarding yard, or "Y," trains and other local trains that deliver and/or pick up stand-alone railroad (SARR) traffic at shipper locations. However, the Board explains that the reasoning of that order was supported by the record and

precedent, and that a decision by TPI not to file such supplemental evidence may impact its case. We will deny reconsideration of the Board's order that CSXT file supplemental RTC model evidence and will deny CSXT's motion to amend the procedural schedule.

Yard trains. TPI argues that the Board should reconsider its decision to order TPI to add historic "Y" trains to its train list and run its RTC model with that revised train list.³ TPI claims that it has already accounted for the "Y" trains in its evidence, and that CSXT's use of TPI's methodology to develop operating statistics for "Y" trains—despite its arguments that TPI neglected to include 28,860 "Y" trains—shows the validity of TPI's method. According to TPI, the fact that CSXT used the same methodology establishes that the Board need not resolve a "mismatch" between the parties' evidence by ordering supplemental evidence. TPI argues that, given the lack of a mismatch between the parties' evidence, Board precedent does not permit the Board to order the supplemental "Y" train evidence. TPI claims that adding "Y" trains would duplicate "Y" train statistics already in its evidence.

TPI also claims it would be difficult to comply with the Board's order to add "Y" trains. First, TPI argues that additional "Y" trains would require it to modify its yard train operating statistics and expense calculation model, but that the Board prohibited such modifications. Second, TPI claims that the Supplemental Evidence Order does not clearly identify whether TPI should add historic "Y" trains, or the 28,860 "Y" trains that CSXT argues are necessary. TPI claims that the 28,860 trains identified by CSXT are not "historic" and that identification of historic "Y" trains would be extraordinarily difficult, time consuming, and expensive. TPI claims that "Y" trains could not be modeled in the RTC model without developing new evidence of record by reviewing CSXT traffic data.

Finally, TPI argues that there is no reason to include "Y" trains in its RTC model because such trains operate almost exclusively within yard limits, and yard operations are not modeled by RTC. TPI claims that the only possible reason to add "Y" trains would be to measure potential interference of the "Y" trains with other train operations when "Y" trains do go outside yards,

³ TPI Petition 3-9. While the Supplemental Evidence Order, slip op. at 6-7, instructed TPI to file evidence regarding "Y" trains and all other trains that deliver and/or pick up SARR traffic at shipper locations, TPI seeks reconsideration only with regard to the "Y" train issue. TPI Petition 2, 3 n.3.

but that both parties addressed that issue by adding a sample of “Y” trains to their RTC models due to the difficulty of identifying historic “Y” train operations.

CSXT replies that the Board did not err by ordering the supplemental “Y” train evidence and that the decision was consistent with Board precedent.⁴ CSXT argues that TPI’s “Y” train evidence ignored “Y” train movements between yards and customer facilities and that CSXT did not adopt TPI’s method for accounting for these trains. CSXT claims that it included operating expenses for “Y” trains in its evidence,⁵ and therefore TPI’s suggestion that the parties agree regarding the need for such evidence is wrong. According to CSXT, TPI overstates the burden of developing supplemental “Y” train evidence. CSXT argues that an RTC model that includes “Y” trains would capture any effects those trains have on the network when they leave their yards.

We decline to reconsider the reasoning that led the Board to order TPI to supplement its evidence by adding “Y” trains. The Board explained that it had authority to ask parties to submit evidence necessary for it to complete its regulatory review and noted its concern that TPI’s operating plan may be unacceptable because it lacks necessary trains to provide local service. Supplemental Evidence Order, slip op. at 6 (citing E.I. DuPont de Nemours & Co. v. Norfolk S. Ry. (DuPont), NOR 42125, slip op. at 38 (STB served Mar. 24, 2014)). TPI does not make any argument that causes us to reconsider this conclusion.

TPI claims that it accounted for “Y” trains. But as the Board explained in the Supplemental Evidence Order, slip op. at 6, the issue the Board sought to address by ordering the supplemental evidence is service between yards and shipment origins and destinations. CSXT argues that TPI’s method did not account for this service,⁶ and TPI’s arguments do not alleviate the Board’s concern that TPI has not accounted for those movements.

⁴ CSXT Reply to Petition 5-11.

⁵ While CSXT acknowledges that it did not input all of the required trains into the RTC simulation it submitted in its reply rate reasonableness evidence, it notes that its supplemental RTC simulation “will incorporate all required trains (including industrial yard trains).” CSXT Reply to Petition 8 n.11.

⁶ CSXT Reply to Petition 7.

The record to date shows that historic “Y” trains did not operate only within yards but also provided service between yards and shipment origins and destinations. CSXT has identified “Y” trains that served industries beyond yard limits in real-world locations that correspond with the SARR.⁷ In addition, a CSXT document, which includes the industry locations served by CSXT, the milepost at which the industry is located, and which trains served that location, shows that historic “Y” trains played a significant role in serving customer locations.⁸ Given that TPI has based its operating plan on historic train service,⁹ it must show that it has adequately accounted for these historic trains. See DuPont, slip op. at 38.

TPI argues that CSXT used TPI’s method of accounting for “Y” trains to develop operating statistics, and CSXT’s use of that method validates TPI’s evidence. This argument does not cause us to reconsider the Board’s decision. Regardless of how CSXT developed “Y” train operating statistics, the issue here is not whether the parties’ evidence “matches,” but rather whether the complainant included the trains necessary to serve its traffic group. That issue is distinct from how CSXT developed its operating statistics for “Y” trains.

In any event, contrary to TPI’s argument, the Board may order supplemental evidence to address an inadequate record and is not limited to ordering evidence only when there is a mismatch between parties’ evidence.¹⁰ The Board has in the past ordered supplemental evidence

⁷ CSXT Reply workpaper “YardJobs_OnSARR_w_Customers.xlsx”. This CSXT workpaper has eight sheets with discrete steps in CSXT’s identification of the “Y” trains that handled traffic that is part of TPI’s selected traffic group. The sheet “FinalTrains_Include_w_Customer” identifies the train ID, customer ID, and number of shipments for “Y” trains that handled the traffic. CSXT also provided a workpaper that identifies “Y” trains that served issue traffic. CSXT Reply workpaper “YardJobs_OnSARR_Serving_IssueTraffic.xlsx”. This “Y” train information is summarized in CSXT Reply workpaper “IssueTrafficYardTrains.xls”.

⁸ CSXT Reply workpaper “CSA Report.xlsx”.

⁹ TPI Opening I-15 to I-16; TPI Rebuttal III-C-7.

¹⁰ See Supplemental Evidence Order, slip op. at 6-7 (“This omission leaves us with an incomplete record, and our precedent establishes that we may request that TPI provide us with evidence necessary to complete our regulatory review process.”); Pub. Serv. Co. of Col. d/b/a

(continued . . .)

to address other issues. See AEP Tex. N. Co. v. BNSF Ry., NOR 421191 (Sub-No. 1), slip op. at 1-2 (STB served Nov. 8, 2006) (ordering supplemental evidence in two rates proceedings to reflect changes in Board rules for such proceedings). TPI cites no authority that restricts the Board from ordering the evidence it ordered in the Supplemental Evidence Order and does not provide an acceptable solution for resolving the issue the Board identified—an incomplete record due to the potential lack of a minimally acceptable operating plan from either party—without supplemental evidence. TPI suggests that the Board should choose which party’s evidence is best because, according to TPI, the parties agree on certain points. But TPI does not explain how the Board could order relief based on an operating plan that has not been shown to accomplish its fundamental purpose of moving the selected traffic group from origin to destination. See Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 6 S.T.B. 573, 589 (2003) (“[T]he SARR must meet the transportation needs of the traffic in the group by providing service that is equal to (or better than) the existing service for that traffic.”).

TPI also argues that the RTC model would never capture the vast majority of “Y” trains anyway.¹¹ TPI points out, and we acknowledge, that the RTC model is not used to develop “Y” train operating statistics when those trains operate solely within a given yard. However, as the Board explained, the RTC model provides essential evidence to support a SARR’s configuration and certain broader operating statistics. Supplemental Evidence Order, slip op. at 7-8. This is not a new idea; the Board has repeatedly explained the importance of the RTC model evidence to confirm these aspects of an operating plan. W. Fuels Ass’n v. BNSF Ry., NOR 42088, slip op. at 15 (STB served Sept. 10, 2007); Otter Tail Power Co. v. BNSF Ry. (Otter Tail 2006), NOR 42071, slip op. at 18-19 (served Jan. 27, 2006); Xcel 2004, 7 S.T.B. at 613-14. The operation of “Y” trains outside of yards can affect the functioning of the model, and TPI acknowledges that modeling “Y” trains in an RTC simulation would measure potential

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Xcel Energy v. Burlington N. & Santa Fe Ry. (Xcel 2005), NOR 42057, slip op. at 3-5 (STB served Jan. 19, 2005); Otter Tail Power Co. v. Burlington N. & Santa Fe Ry. (Otter Tail 2004), NOR 42071, slip op. at 1-2 (STB served Dec. 13, 2004); Pub. Serv. Co. of Col. d/b/a Xcel Energy v. Burlington N. & Santa Fe Ry. (Xcel 2004), 7 S.T.B. 589, 609-10 (2004) (The Board may seek supplemental evidence from parties in order to provide an adequate record to fulfill its responsibilities to “investigat[e] the reasonableness of a challenged rate, mak[e] findings as to its reasonableness, and then tak[e] appropriate action to compel compliance with the statute.”).

¹¹ TPI Petition 8.

interference by “Y” trains with other train operations.¹² This potential interference is one of the reasons the Board directed the parties to model these operations. Although CSXT questions whether including “Y” trains in the RTC model provides significant evidentiary benefit, CSXT acknowledges that yard trains may operate 15 miles or more beyond their home yard,¹³ and the evidence discussed above shows that significant numbers of “Y” trains go outside their yards to serve local industry. Therefore, the Board continues to believe there is sufficient evidentiary value to requiring the parties to run the RTC model with their amended train lists.

In the Supplemental Evidence Order, slip op. at 9, the Board did not resolve the question of whether TPI’s operating plan lacks a significant number of “Y” trains, and we will not do so here. Rather, the Board explained that TPI may “argue that its unrevised evidence is superior to its supplemental evidence, but [TPI] must provide the supplemental evidence regardless of those arguments.” *Id.* While we will not reconsider the Board’s conclusion that TPI *should* submit this evidence, we will reconsider the order by allowing TPI to decline to file additional evidence regarding “Y” trains and other local trains that deliver and/or pick up SARR traffic at shipper locations if TPI believes it can make its case by arguing that its existing evidence is sufficient. Given this revision to the Board’s order, we need not address TPI’s claim that requiring it to submit such evidence is excessively burdensome. However, if TPI chooses not to file revised evidence that includes the trains necessary to serve its selected traffic group, that choice may have repercussions for TPI’s case. See Supplemental Evidence Order, slip op. at 6; DuPont, slip op. at 38.

CSXT’s RTC model. TPI argues that the Board should reconsider its order that CSXT submit “an RTC model that reflects its narrative and spreadsheet evidence in order to provide a complete record for this proceeding.”¹⁴ First, TPI claims that the order is inconsistent with the Board’s precedent for requesting such evidence and will inappropriately create greater differences between the parties’ evidence. Second, TPI argues that the order will require CSXT to revise its narrative and spreadsheet evidence, contrary to the Board’s order. Third, TPI claims that it has based parts of its rebuttal evidence on CSXT’s reply, and allowing CSXT to file supplemental evidence will negate that rebuttal evidence, unfairly imposing litigation costs upon TPI.

¹² TPI Petition 8.

¹³ CSXT Reply to Petition 10.

¹⁴ TPI Petition 9-14.

CSXT replies that TPI's arguments do not support reconsideration of the Board's decision to order CSXT to submit supplemental RTC model evidence and that the decision was not inconsistent with Board precedent.¹⁵ CSXT argues that its RTC model did not constitute a "failure of proof," that similarities between the parties' RTC models and their results contradict TPI's argument, and that CSXT's supplemental RTC evidence will not place a significant burden on TPI.

The Board was correct to order CSXT to file revised RTC model evidence. First, as discussed above, the Board has authority to request evidence that will allow it to complete its regulatory review, and such requests are not limited to resolving mismatches between parties' evidence. While TPI argues that the issues with CSXT's RTC model constitute a "failure of proof" that CSXT should not be allowed to correct at TPI's expense, TPI does not address the Supplemental Evidence Order, slip op. at 6-7, where the Board explained that "neither party has provided the evidence necessary for the Board to complete its regulatory review" and that, due to the combined omissions of *both* parties, the Board decided to seek supplemental evidence. See Xcel 2005, slip op. at 3-5; Otter Tail 2004, slip op. at 1-2; Xcel 2004, 7 S.T.B. at 609-10.

Second, TPI claims that, in order for CSXT to run its RTC model to completion, CSXT must revise evidence that the Board's order prohibits. This argument also does not provide a basis for reconsideration. As explained below, the Board's intent in the Supplemental Evidence Order and the Compliance Evidence Order was to allow parties to make necessary changes that followed from the supplemental evidence the Board ordered, including changes to infrastructure. Further, CSXT claims that it does not intend to modify its yard dwell times or number of receiving or departure tracks as part of its supplemental evidence.¹⁶ If CSXT does make any changes to its evidence that TPI believes are beyond the scope allowed by the Board, TPI may argue this point in its reply to CSXT's supplemental evidence.

Third, TPI's argument that requiring CSXT to submit a revised RTC model will unfairly create a significant burden for TPI does not cause the Board to reconsider its decision. TPI claims that because it adopted aspects of CSXT's reply evidence that were based on its RTC model, the Board has effectively negated that evidence while prohibiting TPI from modifying it.

¹⁵ CSXT Reply to Petition 11-15.

¹⁶ CSXT Reply to Petition 14-15.

However, TPI may argue that its previously adopted evidence is superior to any revised evidence filed. It also may adopt CSXT's supplemental evidence to the extent it chooses, or propose modifications to that evidence as appropriate. Again, we note the necessity of a complete record for the Board's review of this case. We therefore will not reconsider the Board's order that CSXT submit a revised RTC model.

Peak week versus average week in RTC model. CSXT points out that its MultiRail train list reflects an average week rather than a peak week, and claims that it chose to run its RTC model with a modified version of TPI's opening train list in order to minimize potential conflict between the parties regarding whether an RTC model run with an average week train list is acceptable.¹⁷ We will clarify that although the Board ordered CSXT to run its RTC model with its MultiRail train list, the Board did not intend to prevent CSXT from adjusting that train list to reflect the peak week if it chooses to do so.

RTC simulations generally have, in the past, modeled the peak week of the peak year, in order to reflect the highest traffic levels of the SARR. See, e.g., W. Fuels Ass'n, slip op. at 15; Otter Tail 2006, slip op. at 18-19. As discussed above, an RTC model must account for all trains in order to demonstrate the adequacy of the track configuration and the accuracy of the statistics generated by the RTC model. Additional trains, including yard and local trains, could affect the model by occupying tracks and affecting the operations of other trains, potentially requiring additional infrastructure to allow traffic to move sufficiently. An RTC model that does not reflect the peak week may not demonstrate this because such a model would include a lower amount of traffic than a peak week. However, the impact of running the RTC model with a MultiRail train list that reflects an average week arguably may be limited here. First, the MultiRail train list only includes merchandise traffic, and therefore the rest of CSXT's train list would reflect the peak week.¹⁸ In addition, the Board has not decided whether, in a case with a diverse commodity mix such as this one, an RTC model must be run entirely with peak week traffic or whether the limited use of an average week for a merchandise train list generated by MultiRail is acceptable, although the Board has acknowledged the issue. See DuPont, slip op. at 37 n.53. Therefore, CSXT may choose whether and how to adjust the MultiRail train list for the peak week, and the Board will consider arguments made regarding those choices.

¹⁷ CSXT Reply to Petition 11-12.

¹⁸ CSXT Reply III-C-61 & n.91, III-C-136, III-C-137.

Clarification. We will also clarify two additional issues raised by the parties' reconsideration filings. First, the Board did not order TPI to add the specific 28,860 "Y" trains that CSXT alleges are missing. Rather, the Board ordered (and now asks) TPI to add sufficient "Y" trains to ensure that its SARR provides the necessary train service between yards and customer locations. If TPI chooses to revise its "Y" train evidence, TPI may determine the necessary trains in any way that it can support in its filings.

Second, both TPI and CSXT may make changes to their evidence that follow from the supplemental evidence ordered by the Board. We recognize that the Board stated that "parties may not revise their evidence beyond the scope that we describe here." Supplemental Evidence Order, slip op. at 9. However, the Board also instructed parties to recalculate service units based on their amended train lists and RTC results, recalculate all costs that are dependent on the amended train statistics, and adjust infrastructure as necessitated by RTC modeling. Compliance Evidence Order, slip op. at 2. The intent of these instructions was to advise the parties that they could make changes to their evidence that follow from the supplemental evidence that the Board ordered, but that they should not take this as an opportunity to redesign their SARR or make other unrelated changes.

Procedural schedule. CSXT argues in its motion to amend the procedural schedule that it will be difficult for both parties to prepare the supplemental evidence under the procedural schedule established by the Board in the Supplemental Evidence Order. TPI opposes CSXT's motion, arguing that extending the procedural schedule would unnecessarily delay any potential rate relief.

We will deny the motion to amend the procedural schedule. If, in light of this decision, the parties agree to an amended procedural schedule, they may file a joint motion to amend the schedule or a party may otherwise file a motion based on this decision.

It is ordered:

1. The Supplemental Evidence Order is reconsidered to the extent that TPI may elect whether to file supplemental evidence regarding "Y" trains and all other trains that deliver and/or pick up SARR traffic at shipper locations.
2. TPI's petition for reconsideration of the order that CSXT file supplemental RTC model evidence is denied. CSXT may choose whether and how to adjust the MultiRail train list for the peak week.
3. CSXT's motion to amend the procedural schedule is denied. The parties may file a joint motion to amend the procedural schedule if they reach agreement on a revised schedule or a party may otherwise file a motion based on this decision.

4. TPI's motion for leave to file a reply to a reply is denied. CSXT's reply to TPI's motion for leave to file a reply to a reply is rejected as moot.

5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.